

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BOBBY D. DRY, JR.)	
Claimant)	
VS.)	
)	Docket No. 180,347
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund requested review of the Award dated January 21, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on June 25, 1997.

APPEARANCES

Boyd A. Byers of Wichita, Kansas, appeared for the respondent and its insurance carrier. Norman I. Cooley of Wichita, Kansas, appeared for the Workers Compensation Fund. There were no other appearances.

ISSUES

The only issue presented and decided by the Administrative Law Judge in the January 21, 1997, Award was the liability of the Workers Compensation Fund. The Administrative Law Judge held the Workers Compensation Fund was responsible for the

entirety of the benefits payable to claimant as a result of his August 6, 1993, work-related accident. The Workers Compensation Fund requested the Appeals Board to review that holding. The only issue before the Appeals Board on this review is the liability, if any, of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be affirmed.

Claimant reinjured his back while working for the respondent on August 6, 1993. Claimant settled his workers compensation claim for the August 6, 1993, accident with the respondent and insurance carrier by entering into a stipulated award in which claimant received permanent partial disability benefits for a 6 percent whole body functional impairment. The Workers Compensation Fund was a party to that settlement and was a signatory to the stipulated Award. The only issue reserved for future determination was the Workers Compensation Fund's liability for any portion of that stipulated Award which was filed with the Division on April 26, 1995.

Before liability can be assessed against the Workers Compensation Fund, the respondent and its insurance carrier must prove the respondent either hired or retained claimant in its employment with knowledge claimant had an impairment which constituted a handicap. See K.S.A. 44-567(a). A handicapped individual is defined by K.S.A. 44-566 as one afflicted with an impairment of such character it constitutes a handicap in obtaining or retaining employment. The respondent's knowledge of the preexisting impairment may be established by any evidence sufficient to satisfy the respondent's burden of proof. See K.S.A. 44-567(b).

Next, respondent and its insurance carrier must prove the resulting injury or disability either "would not have occurred but for the preexisting physical or mental impairment" or the resulting disability "was contributed to by the preexisting impairment." See K.S.A. 44-567(a)(1), (2).

The Appeals Board finds the respondent retained claimant in its employment with knowledge claimant had a physical impairment from a prior back injury. That conclusion is based upon the finding that claimant sustained a back and neck injury while working for this same respondent in April 1987. Claimant initiated a workers compensation proceeding for the 1987 injury and ultimately settled the claim in March 1988 based upon a 5 percent whole body functional impairment rating. As a result of the 1987 accident, claimant was given permanent medical restrictions which he was to observe. Because of the 1987 accident and resulting employment problems, claimant did not work for the respondent between July 23, 1987, and December 1988.

In December 1988, claimant returned to work for the respondent with medical restrictions of no lifting over 25 pounds, no overhead work, and no operating cranes or vehicles. After returning to work, claimant sought medical treatment from respondent's medical department on various occasions for neck, back, and sacroiliac problems. On at least one occasion, claimant requested disability parking privileges because of a severe flare up in symptoms.

Based upon the above, the Appeals Board finds claimant's physical impairment from the 1987 injury affected his ability to work and was of such character as to constitute a handicap in obtaining or retaining employment.

The Appeals Board also finds the August 6, 1993, accident and resulting disability would not have occurred "but for" the preexisting impairment. That conclusion is based upon the uncontroverted testimony of Ernest R. Schlachter, M.D. Dr. Schlachter testified the August 6, 1993, accident reinjured claimant's spine and caused additional injury and permanent impairment. Additionally, the doctor testified claimant would not have sustained the injury or additional permanent impairment "but for" the preexisting spinal condition which made him more susceptible to reinjury from even a relatively minor trauma.

The Appeals Board also finds claimant sustained additional permanent impairment as a result of the August 1993 accident and claimant's whole body functional impairment is now 6 percent. That conclusion is based upon the letter of Paul D. Lesko, M.D., dated August 15, 1994, which the parties utilized as the basis for the stipulated 6 percent permanent partial general disability shown in the stipulated Award signed by the parties and previously filed with the Division.

One of the Workers Compensation Fund's principal arguments is that the respondent had earlier misdiagnosed claimant's back condition after the 1987 injury and mistakenly reported to the Division that claimant had arthritis and physical deformity of the spine. The Appeals Board finds the Workers Compensation Fund's argument is misplaced. As indicated above, respondent's knowledge of preexisting impairment may be established by any evidence. The fact that respondent may have misdiagnosed claimant's condition is not relevant as it is knowledge of the impairment and handicap rather than knowledge of a specific medical diagnosis which is germane. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 268, 740 P.2d 98 (1987), *aff'd* 242 Kan. 430, 748 P.2d 420 (1988).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated January 21, 1997, entered by Administrative Law Judge John D. Clark should be, and hereby is, affirmed.

BOBBY D. DRY, JR.

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IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Boyd A. Byers, Wichita, KS
 Norman I. Cooley, Wichita, KS
 John D. Clark, Administrative Law Judge
 Philip S. Harness, Director